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# In the Supreme Court of the United States

OCTOBER TERM, 1980

MILWAUKEE TYPOGRAPHICAL UNION NO. 23,

*Petitioner,*

*vs.*

NEWSPAPERS, INC.,

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals For The Seventh Circuit**

## BRIEF FOR RESPONDENT IN OPPOSITION

DAVID W. CROYSDALE
777 East Wisconsin Avenue
Milwaukee, Wisconsin 53202

*Counsel for Respondent*

*Of Counsel:*

DAVID C. CHRISTENSEN
HERZ, LEVIN, TEPER,
SUMNER & CROYSDALE, S.C.
777 East Wisconsin Avenue
Milwaukee, Wisconsin 53202

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HAMMERSMITH-BREITHAUPT PRINTING CORP., MILWAUKEE, WIS. 53212

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## QUESTIONS PRESENTED

1. Whether the decision of the court of appeals is in conflict with the decision of another federal court of appeals on the same matter.

2. Whether the court of appeals has decided this case in a way in conflict with applicable decisions of this Court.

3. Whether the court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

## PARTIES

The parent entity of the Respondent is The Journal Company. The Respondent has no subsidiaries but is affiliated with the following entities: MJE Corporation; Tempo Communications, Inc.; Midwestern Relay Co.; Trumbull Printing Co.; Perry Printing Co.; WTMJ, Inc.; and Teltron, Inc.

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## OPINIONS BELOW

The opinion of the District Court (App. of the Pet., p. A33) is reported at 482 F. Supp. 1238 (E.D. Wis. 1980). The opinion of the Court of Appeals for the Seventh Circuit together with denial of petition for rehearing (App. of the Pet., p. A53) is reported at 639 F. 2d 386 (7th Cir. 1981).

## STATEMENT OF THE CASE

The Statement of the Case set out in the Petition (at pp. 12-26) is in most respects adequate. However, a serious mischaracterization occurs at page 18 of the Petition with the contention that Arbitrator Warns decided the Hendrix System and its "impact" upon the bargaining unit were expressly within the three distinct topics reserved for arbitration by Section 4 of the labor agreement. In fact, Warns sanctioned the introduction of the system and the respondent's work assignments with respect to same in part 1 of his award (App. of the Pet., p. A26). He then proceeded, however, to fashion parts 2 and 3 of the award, although admittedly without basis in Section 4 or other language in the labor agreement (App. of the Pet., p. A23).

Further, respondent objects to petitioner's characterization of the significance of the votes of three judges in the Court of Appeals for a rehearing en banc in this case (Pet., p. 29). There is no basis whatever to suppose that these three judges hold the views on the merits which petitioner attributes to them (*See* App. of the Pet., p. A68, n. 1).

## SUMMARY OF ARGUMENT

In reviewing the award at issue, the Court of Appeals took a restrained and limited view of its role, adhering to the principles set out in *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960). Accordingly, the award was tested for its fidelity to the labor agreement. Upon finding the award in irreconcilable conflict with the subject matters clearly marked out for arbitration in the contract, the Court invalidated the award without further inquiry, either into the reasoning of the arbitrator or his remedy. The authorities cited by the petitioner acknowledge the validity of the Court's approach. Further, there being no ambiguity in the award, cases cited by petitioner with respect to the remand of uncertain or incomplete arbitration awards are inapposite.

There is no merit to petitioner's assertion that this case demonstrates a need for further refinement of the standards of judicial review set out in the *Steelworkers Trilogy*.[1] The commentators adduced by petitioner recognize the validity of the procedure here utilized by the Court of Appeals and call for the elucidation of the *Trilogy* only in situations where a reviewing court has displaced the arbitrator and undertaken its own analysis of ambiguous contract language. Such is not the case now before this Court.

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[1] *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); and, in particular, *Enterprise Wheel and Car, supra.*

## ARGUMENT

### I. THE CASE BELOW WAS CORRECTLY DECIDED AND IS IN ACCORD WITH THE DECISIONS OF OTHER COURTS OF APPEAL AND THIS COURT.

In reviewing the award of Arbitrator Warns, the Court of Appeals took a clear and forthright approach applying standards established in *Enterprise Wheel & Car*. There this Court stated:

> . . . [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award. 363 U.S. at 597.

Accordingly, the Court of Appeals here reviewed the language of Section 4 of the labor agreement, the only portion of the contract even arguably applicable to the introduction of the Hendrix system (App. of the Pet., p. A64). Section 4 provides that in the event a new technological process is introduced into composing room work, three topics and *three topics only*[2] are subject to arbitration: the method of operation, the complement of men required or the retraining of affected employees. Yet Arbitrator Warns, after confirming respondent's right to introduce the Hendrix system and its work assignments with respect thereto (App. of the Pet., p. A26), proceeded to insert a fourth topic: the "impact" or effects of the new

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[2] The parties had agreed in Section 5 of the contract that their complete obligations to one another were expressed in that agreement. (App. of the Pet., p. A64, n. 7).

technology on members of the bargaining unit. As indicated by the Court of Appeals, "impact" goes far beyond any of the three topics specifically subject to arbitration (App. of the Pet., pp. A64-65). Upon concluding that "... the award itself demonstrates an infidelity to the plain restrictive terms of the contract" (App. of the Pet., p. A65), the Court's inquiry ceased. No examination of the arbitrator's reasoning or remedy was made (*Id.*). In addition to *Enterprise Wheel & Car,* the Court relied upon *City Electric, Inc. v. Local Union 77, Int'l Brotherhood of Electrical Workers,* 517 F. 2d 616 (9th Cir. 1975), cert. denied 423 U.S. 894 (1975), a case closely analogous to the one at bar. There, the court refused enforcement of the arbitrator's order that the parties bargain a daily stipend or travel allowance. In a two part award the arbitrator had determined (1) the employer-contractor was not required to pay a stipend under the "job headquarters" contract provision as contended by the Union yet (2) the employer-contractor should still be required to negotiate such a stipend because the prevailing practice of *other* employer-contractors in the area was to negotiate ad hoc agreements for stipends.

The Ninth Circuit forthrightly rejected the second part of the arbitrator's award, reasoning

> It is not the function of an arbitrator, under this agreement or traditionally, to decide in what respects the contract in question should be modified in order to bring it into line with agreements of other employers. Contract modifications are not traditionally matters for arbitration. It is the function of the arbitrator to resolve disputes as to what the contract itself provides — as to what the rights of the parties are under the contract then in force. . . . 517 F. 2d at 619.

In the instant case, Arbitrator Warns found no contract violation yet proceeded in Part 2 of the award to impose

a duty to negotiate which is wholly without basis in the labor agreement.[3]

Since there is no ambiguity in either the pertinent contract language or the Warns award, petitioner's two principal lines of argument fail. First it is contended that the decision of the Court of Appeals herein reflects a disharmony among the circuits on the proper scope of judicial review of arbitral awards. This argument, however, is premised upon the supposition that the Court of Appeals was merely reinterpreting an ambiguous contract provision. In fact, as demonstrated above, the court engaged in the restrained and limited type of review specified in *Enterprise Wheel & Car* and endorsed by case authorities cited by petitioner (Pet. pp. 31-34). In *Boise Cascade Corp. v. United Steelworkers of America,* 588 F. 2d 127 (5th Cir. 1979), cert. denied 444 U.S. 830 (1979), unlike the present case, an ambiguous contract provision was at issue. Further, the court noted ". . . courts will enforce clear contractual limitations on the authority of the arbitrator. [Cit. om.] In contrast, the employer in this case does not argue that the collective bargaining agreement barred the arbitrator from deciding the issue in dispute". 588 F. 2d at 129, n. 2. Similarly, *Torrington Co. v. Metal Products Workers Union,* 362 F. 2d 677 (2nd Cir. 1966):

> Although the arbitrator's decision on the merits is final as to questions of law and fact, his authority is contractual in nature and is limited to the powers conferred in the collective bargaining agreement. . . . The question of the arbitrator's authority is really

[3] As for petitioner's attempt to distinguish *City Electric* (Pet., p. 32), it is difficult to see how the Labor-Management Committee in that case (517 F. 2d at 618) is any less a "specific procedure for dispute resolution" than the Joint Standing Committee in Section 4 of the labor agreement herein (See App. of the Pet., p. A8).

> one of his contractual jurisdiction, and the courts cannot be expected to place their stamp of approval upon his action without making some examination of his jurisdiction to act. 362 F. 2d at 680 & n. 6[4]

Finally, *F. W. Woolworth Co. v. Miscellaneous Warehousemen's Union*, 629 F. 2d 1204 (7th Cir. 1980) and *Johnson Bronze Co. v. United Auto Workers*, 621 F. 2d 81 (3rd Cir. 1980) are both inapplicable here since each involved competing interpretations by arbitrators and reviewing courts of *ambiguous* contract provisions.

Second, petitioner appears to argue that there is some ambiguity in the Warns award in the use of its term "impact" and that therefore the award is merely incomplete and need only be remanded to the arbitrator for clarification (Pet., pp. 34-35). However, as indicated in the decision of the Court of Appeals there is no doubt whatever about the meaning of that common labor law term and no need to engage in any "interpretation" to reach that meaning (App. of the Pet., pp. A64-65). "Impact" means such topics as layoffs, terminations. bonuses and the like, all items clearly outside the scope of the three specific subjects for arbitration delineated in Section 4 of the labor agreement. Finally, if there were any

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[4] *See also, Monongahela Power Co. v. Local No. 2332, IBEW*, 566 F. 2d 1196, 1198-99 (4th Cir. 1976):

> The powers of an arbitrator are not unlimited. He derives his authority from and is bound by the terms of the contract from which he draws his authority; and while '[H]e may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement.' His function is confined to the interpretation and application of the collective bargaining agreement under which he acts and, while he may give his own construction to ambiguous language, he is without any authority to disregard or modify plain and unambiguous provisions. This is a well-established principle of law.... (footnotes omitted).

doubt that "impact" is to be understood in its commonly accepted meaning, that doubt is removed by Warns' express reference to decisions of the National Labor Relations Board (App. of the Pet., App. A23-25). This reference makes it clear that Warns had in mind the same meaning of "impact" as was understood by the Court of Appeals. Consequently, there is no need for remand to arbitration. There can be no doubt that on remand the arbitrator's remedy would embrace the forbidden areas of layoffs, terminations, bonuses, etc. For the foregoing reasons, the cases cited by petitioner in support of remand are inapplicable: *Enterprise Wheel & Car, supra* (ambiguity in award of back pay); *General Warehousemen & Helpers v. Standard Brands, Inc.*, 579 F. 2d 1282 (5th Cir. 1978) (remand for calculation of damages in context of admitted contractual violations by employer); *United Steelworkers of America v. W. C. Bradley Co.*, 551 F. 2d 72 (5th Cir. 1977) (remand for consideration in light of new evidence); *Hart v. Overseas National Airways, Inc.*, 541 F. 2d 386 (3rd Cir. 1976) (remand to district court for clarification on the question of liability and then to arbitrator for ministerial calculation of damages); and *Int'l Brotherhood of Electrical Workers v. Olin Corp.*, 471 F. 2d 468 (6th Cir. 1972) (remand of ambiguous award for computation of lost earnings).

In summary, petitioner's entire assault upon the validity of the decision of the Court of Appeals is based upon the premise that there is ambiguity in the contract language or in the award. There is no such ambiguity in this case and the analysis utilized by the Court of Appeals is in harmony with decisions of this Court and other Circuit Courts of Appeal.

## II. THIS CASE CALLS FOR NO ELABORATION OF THE PRINCIPLES SET OUT IN THE *STEELWORKERS TRILOGY*.

As demonstrated above, there is no conflict among the Circuit Courts of Appeal on the proper scope of judicial review where, as here, the contract and arbitration award are clear and unambiguous. Petitioner, however, also cites various commentators for the proposition that a refinement of principles in the *Trilogy* is now required (Pet., pp. 30-31, 36). Yet these commentators follow the case law to the effect that a reviewing court must at least satisfy itself that the arbitrator has stayed within his grant of power in the contract. For example, Professor Kaden states "Certain qualifications to the principle of finality are well settled. Thus, if a contract clearly denies the arbitrator jurisdiction over a particular complaint, a court must refuse to enforce an award that he was without authority to issue." 80 COLUM. L. REV. 267, 296 (1980). Similarly, Professor St. Antoine in discussing exceptions to the principle of judicial deference to arbitration awards:

> . . . The appropriate scope of judicial review should be determined by the particular agreement in any case, not by anything inherent in the arbitration or collective bargaining process. I should have thought this was pretty clear from *Enterprise Wheel* itself. For all the bouquets thrown arbitrators and arbitration by Justice Douglas, it is ultimately the 'collective bargaining agreement' from which an award must draw its 'essence' in order to be valid and enforceable.
>
> . . . [T]he arbitrator remains the creature of contract, and the parties retain the power to remove such disputes from his purview as they see fit. 75 MICH. L. REV. 1137, 1142, 1150 (1977),

and Raymond L. Hogler, 31 LABOR LAW JOURNAL 570, 571 (1980): "... it is nevertheless established that an award which is 'contrary to the terms of the collective bargaining contract' will not be upheld".

Even if it were conceded that in some instances reviewing courts have erred by merely displacing with their own analysis an arbitrator's interpretation of ambiguous contract language, this is certainly not such a case. Any attempt to curb excesses in those cases could only be dictum here. Moreover, there is at present ample admonitory language in the *Trilogy* emphasizing the arbitrator's power to interpret contract language (e.g. *Enterprise Wheel & Car,* 363 U.S. at 599).

## CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

*Respectfully submitted,*

DAVID W. CROYSDALE
777 East Wisconsin Avenue
Milwaukee, Wisconsin 53202

*Counsel for Respondent*

*Of Counsel:*

DAVID C. CHRISTENSEN
HERZ, LEVIN, TEPER,
SUMNER & CROYSDALE, S.C.
777 East Wisconsin Avenue
Milwaukee, Wisconsin 53202

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